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No. 96-1103

In The

Supreme Court of the United States

October Term, 1996

MISSOURI PACIFIC RAILROAD COMPANY,
d/b/a UNION PACIFIC RAILROAD COMPANY,
a Delaware corporation,

Petitioner,

v.

JAMES M. JOHNSON and FRANCES L. JOHNSON,
as Representatives of the ESTATE OF
JEREMY MICHAEL JOHNSON, Deceased,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals, Division 4, Of The State Of Oklahoma

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there is a compelling reason for the Court to review an unpublished, non-precedential, and non-citable opinion of Division 4 of the Court of Appeals of the State of Oklahoma, which does not raise the question presented in the petition.

2. Whether the opinion of the Court of Appeals of the State of Oklahoma appropriately addresses the issue of federal preemption.

3. Whether the opinion below is based upon an adequate and independent state ground.

4. Whether 49 U.S.C. § 20106 permits a state to adopt or continue in force a law relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, James M. Johnson and Frañces L. Johnson, as representatives of the Estate of Jeremy Michael Johnson, deceased, respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of an unpublished opinion of the Court of Appeals, Division 4, of the State of Oklahoma.

STATEMENT OF THE CASE

• The petitioner asks the Court to review an unpublished opinion of Division 4 of the Court of Appeals of the State of Oklahoma. That opinion, under the Oklahoma Supreme Court Rules, "shall not be considered as precedent . . . by any court or cited in any brief. . . . " Oklahoma Supreme Court Rule 1.200(b)(5). Therefore, there are no compelling reasons to review the decision.

• The petitioner alleges that the unpublished opinion of Division 4 of the Court of Appeals of the State of Oklahoma has avoided the issue of federal preemption as addressed in *CSX v. Easterwood*, 507 U.S. 658 (1993). However, the opinion specifically and properly applies *Easterwood* to the facts of this case.

• The petitioner alleges that the opinion below decides an important federal question. However, the opinion below is based upon an adequate and independent state ground. Applying state standards of appellate review, the opinion finds no reversible error. It concludes

that the negligence *per se* instruction the petitioner complains of did not impact the railroad in a manifestly prejudicial way. This Court ordinarily accepts a state appellate court's findings as to what occurred at trial and the basis of the verdict.

• The petitioner alleges that the Federal Railroad Safety Act preempts *all* local regulation of train speed. However, Section 20106 of Title 49 permits a state to adopt or continue in force a law relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard. The record is replete with evidence that the Fort Gibson crossing was an unprotected death trap. Accordingly, the railroad and the town had negotiated and agreed to the safer speed years before.

The Crossing Collision. At 11:10 p.m., January 11, 1991, Jeremy Johnson, age 16, was driving east, about 20 mph, on a residential street in Fort Gibson, Oklahoma. Jeremy was unable to see past the old Trent Hotel on his left until he was only four seconds from the Union Pacific Railroad crossing. The crossing was unprotected. *It had neither installed nor operating lights and gates.* He then looked left, right, and back left. Jeremy's view to his left was so obstructed that he had no time to react and stop his pickup. One second before impact, surviving passengers on Jeremy's right first saw the headlight of a southbound coal train coming from their left. They never heard a whistle.

The petitioner's freight train was traveling at 50 mph – 10 mph faster than the railroad had agreed to operate its trains through the town. The train smashed into Jeremy's pickup, impaled it on the knuckle on the front of

the locomotive, and pushed it 2,250 feet down the tracks. Jeremy and five other young people were killed. Two others were injured. Had the crossing been protected, the collision would not have occurred.

The agreement. After two women were killed at the same crossing almost twenty years before, the railroad and town officials realized that local safety hazards required slower train speeds. They negotiated and agreed to, and the town enacted, a 40 mph speed limit for trains. The railroad also agreed to "investigate the possibility of correcting some blind corners at crossings."

The extrahazardous crossing. Almost two years before Jeremy was killed, the railroad had decided the crossing was so dangerous it should be closed. Nevertheless, it chose not to promptly fulfill its statutory and common law duty to properly maintain safe crossings. Instead, the railroad chose to wait for federal funding to reimburse 90% of its costs. This, despite the railroad's net worth of $1.1 billion and a daily cash flow of $1.1 million in after-tax money.

Causation. The railroad's delay proved to be deadly. The trial court found by clear and convincing evidence that the railroad's conduct showed a wanton, reckless disregard for the rights of others. The jury's verdicts of $1 million actual and $3 million exemplary damages were found by the trial and appellate courts to be reasonable, justified and supported by abundant evidence.

The petitioner's misstatements. The petitioner has misstated facts. The two railroad witnesses *admitted* they could not identify Jeremy Johnson or his vehicle in an attempt "to beat the train," as argued by the petitioner. (p. 6) (App. 1) The two surviving passengers testified

they were never on the street the railroad witnesses described. The train engineer admitted Jeremy was not racing the train, and the two survivors denied the rumor as well. (App. 1-2) Obviously, the jury rejected this contention of the petitioner.

A more egregious misstatement is that the Oklahoma Court of Appeals affirmed the trial court, "avoiding the issue of federal preemption." (p. 6) The Oklahoma Court of Appeals directly addresses federal preemption in its opinion, citing the Federal Railroad Safety Act, formerly 45 U.S.C. §§ 421-447 (1988), now codified at 49 U.S.C. §§ 20101-26102 (1994). It also follows the most recent interpretation of the statute by this Court in *CSX Transportation v. Easterwood*, 507 U.S. 658 (1993).

REASONS WHY THE PETITION SHOULD BE DENIED

SUMMARY OF THE ARGUMENT

There are no compelling reasons for the Court to review an unpublished, non-precedential, and non-citable opinion of a division of an intermediate state appellate court. This is especially true here, where the decision below does *not* avoid preemption. It discusses *Easterwood* at some length and observes that the instruction to the jury on the local ordinance, if erroneous, was harmless. Thus, there is an adequate state ground for the decision below.

Moreover, the jury did not base its verdict on the speed of the train. The only allegation of negligence of the train's engineer was violation of the municipal speed ordinance, and the jury found in favor of the engineer, thus demonstrating that the verdict was not based on

excessive speed. Therefore, the verdict against the railroad was necessarily based upon the presence of an ultra-hazardous crossing with unique local conditions and upon the railroad's failure to install lights and gates.

Federal law specifically permits a state to adopt or continue in force a law relating to railroad safety when necessary to eliminate or reduce essentially local safety hazards. Here, the petitioner negotiated and agreed to such a law.

I.

THERE IS NO COMPELLING REASON TO REVIEW AN UNPUBLISHED, NON-PRECEDENTIAL, AND NON-CITABLE OPINION, WHICH DOES NOT RAISE THE QUESTION PRESENTED IN THE PETITION.

Under the Oklahoma Supreme Court Rules, the unpublished opinion of Division 4 of the Court of Appeals of the State of Oklahoma "shall not be considered as precedent . . . by any court or cited in any brief. . . . " Oklahoma Supreme Court Rule 1.200(b)(5). Therefore, there are no compelling reasons to grant the petition.

The sole Question Presented in the petition (p. i) is: Does the Federal Railroad Safety Act preempt all municipal ordinances which purport to govern the speed of trains through towns and cities in the United States? The petitioner alleges that the unpublished opinion of Division 4 of the Court of Appeals of the State of Oklahoma avoids this question and the issue of federal preemption as addressed in *CSX v. Easterwood*, 507 U.S. 658 (1993).

On the contrary, the opinion properly applies *Easterwood* to the facts of this case. The Court of Appeals of the State of Oklahoma, Division 4, acknowledges this Court's holding in *Easterwood* "that 'federal regulations adopted by the Secretary of Transportation pre-empt [a plaintiff's] negligence action only insofar as it asserts that [a defendant's] train was traveling at an excessive speed.' *Id.* at 676." (App. 6) Therefore, the railroad's contention that the Oklahoma Court of Appeals avoided the issue of federal preemption is untrue.

The Court of Appeals then follows *Easterwood*:

> . . . [W]e are constrained . . . to follow the Supreme Court's interpretation that the federal regulations preempt an action based on excessive speed alone. . . . (App. 6-7)

The Court of Appeals next reasons:

> Our inquiry must then focus on whether the trial court's admission of evidence concerning the train's speed, Fort Gibson's train speed ordinance, and the alleged agreement by Railroad to abide by a lower speed limit was erroneous. Also involved in this inquiry [are] the trial court's instructions touching upon the speed issues. (App. 6)

Finally, the Court of Appeals properly applies the standard of review under Oklahoma law and concludes that any error was harmless.

II.

THE OKLAHOMA OPINION IS BASED UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

The opinion below is based upon an adequate and independent state ground – a procedural rule of general applicability. *See Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875); *Herb v. Pitcairn*, 324 U.S. 117 (1945). Following its discussion of *Easterwood*, the Oklahoma Court of Appeals states:

> . . . [W]e must determine whether the giving of this instruction, while perhaps erroneous, was prejudicial to Railroad in such a way that the jury would not have returned the verdict it did but for the erroneous instruction. *Oklahoma Railway Company v. Wilson*, 231 P.2d 688 (Okla. 1951). When we consider that the jury found Jeremy to be equally negligent with Railroad for the collision, we cannot say that the negligence per se instruction impacted Railroad in a manifestly prejudicial way. This is bolstered by the additional finding by both the trial court and the jury that Railroad was more than just grossly negligent. Both found the conduct of Railroad to be wanton, oppressive, malicious, reckless to the point of disregard for the rights of others, or, perhaps even intentional as it concerned the operation of the train through Fort Gibson and at the time of the collision with Jeremy. (App. 7)

The Court of Appeals then notes:

> We are persuaded that the jury heard the evidence, understood the actions and obligations of the parties, and returned the verdict which reflected their judgment. (App. 7)

Applying state standards of appellate review, the opinion finds any error to be harmless.

> . . . Parents . . . claim is not solely one for negligence due to excessive speed. . . .
>
> * * *
>
> [W]e cannot say that the negligence per se instruction impacted Railroad in a manifestly prejudicial way. . . . We do not believe that the negligence per se instruction was so prejudicial in light of the rest of the instructions as to require reversal of the verdict. (App. 6-7)

This Court ordinarily accepts a state appellate court's findings as to "what occurred at trial" and "the basis of the verdict." *Minneapolis, St. P. & S. Ste. M. Ry. v. Moquin*, 283 U.S. 520, 521 (1931).

III.

THE FEDERAL RAILROAD SAFETY ACT AND *EASTERWOOD* AUTHORIZE STATE REGULATION OF ESSENTIALLY LOCAL SAFETY HAZARDS

The decision below is not in conflict with the FRSA or the Court's decision in *Easterwood*.

The petitioner argues that the "FRSA *EXPRESSLY* [sic] preempts state and local regulation of train speeds." (p. 12). To the contrary, 45 U.S.C. § 434 (now 49 U.S.C. § 20106) expressly *permits* state regulation of train speeds to eliminate an essentially local safety hazard.

> A state may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety

> when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

The plain meaning of Section 20106 is to permit a state to deal with unique local conditions, hazards peculiar to the locality, such as the extraordinary danger of the unprotected Fort Gibson crossing. Local knowledge and local experience are the best and most reliable measure of the need for remedial action, and the form that remedy should take.

Essentially local safety hazards. The crossing was used by school buses, propane trucks, and other motorists. Many unique conditions, including those weighed by traffic engineers considering the need for lights and gates, created specific individual, and essentially local, safety hazards at the crossing. They are: (1) a 20° bend in the roadway just before the crossing; (2) a significantly elevated track; (3) a historical building, the old Trent Hotel, obstructing the view across the northwest corner; (4) a 96.1% deficiency in sight distance needed to safely see a train across the northwest quadrant (the critical area between Jeremy and the train); (5) a hedge and trees limiting visibility across the northwest corner; (6) an old house obstructing the view across the southwest corner; (7) an intersecting street just before the crossing; (8) dual railroad tracks; (9) visual clutter competing for a driver's attention; and (10) a cluster of background city lights blending with the train headlight.

These conditions are essentially local safety hazards at the crossing, which was described at the trial as "unbelievably," "extremely," "extrahazardous." (App. 2) The

restrictions on sight distances are very severe across the quadrant between Jeremy and the train. Because of limited visibility, a school bus loaded with children and a propane truck, which had both stopped, and a motorist traveling 10 mph, had almost been struck by the railroad's freight trains at the crossing. Each motorist was exercising due care. These "near collision" data were maintained by petitioner, but it failed to use the data to improve safety at the crossing.

Nine Deaths in Four Fort Gibson Crossing Collisions within Two Years. The Ft. Gibson corridor was not just dangerous in engineering theory. In less than two years, nine people, including Jeremy, died in four collisions at two Fort Gibson crossings.

State Law. A state may delegate its authority to municipalities. In *Atlantic Coast Line R.R. Co. v. City of Goldsboro*, 232 U.S. 548 (1914), this Court determines that a city ordinance prohibiting the "shifting" of railroad cars within the city limits is a state law:

> A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the state, is a state law within the meaning of the Federal Constitution. [Citations omitted].
>
> * * *
>
> We must therefore treat the ordinances as legislation enacted by virtue of the lawmaking power of the state.

Here, the State of Oklahoma regulates the speed of trains through the Fort Gibson crossings by the municipal ordinance, which the petitioner negotiated and agreed to.

Oklahoma acts through its municipalities to achieve crossing safety where necessary to prevent accidents at crossings:

> The municipal governing body may . . . regulate the crossing of railway tracks and the running of railway engines, cars, and tracks within the limits of the municipality, and . . . govern the speed thereof, and . . . make provisions, rules and restrictions *to prevent accidents at crossings* and on the tracks of railways.

Okla. Stat. Ann. tit. 11, § 22-119 (West 1991)

CONCLUSION

For these reasons, respondents respectfully request the petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX I

* * *

Q. Now, this pickup that you saw go south on Railroad, you don't know for sure that it was the young people involved in this accident; do you?

A. All I know is it was a late model red Chevy pickup. I'm not saying it was that exact truck or not.

Transcript of Jury Trial, Vol. X, p. 29, September 26, 1994 (Testimony of Steven Brewer, railroad witness).

* * *

Q. . . . And, in fact, in your statement, you said you did not know whether this was the pickup involved in the accident; correct?

A. Correct.

Transcript of Jury Trial, Vol. X, p. 44, September 26, 1994 (Testimony of Donella Clopton, railroad witness).

* * *

Q. Sir, is it your opinion, based on your observations that when – from your observation of Jeremy's pickup, that it was not racing the train, to beat the train; correct?

A. Correct.

Transcript of Jury Trial, Vol. V, p. 64, September 16, 1994 (Testimony of Ernest Richardson, railroad engineer).

* * *

Q. Now, you are aware of the fact, aren't you, Thomas, that there was a – a rumor after this that you all had come up here in this direction [indicating], come

around here, and turned, and come down here, and tried – raced the train down here, and tried to beat it across?

A. Yes.

Q. Is that true?

A. No, sir.

Transcript of Jury Trial, Vol. VI, p. 213, September 19, 1994 (Testimony of Thomas Jackson, surviving passenger).

* * *

Q. But you said you wanted to testify?

A. Yes.

Q. Why is that?

A. Because there were too many rumors about that night, and I wanted to – I wanted them to hear my own story.

Transcript of Jury Trial, Vol. VII, p. 130, September 21, 1994 (Testimony of Linda Duvall, surviving passenger).

* * *

Q. Did you reach an opinion as to whether this crossing, on and before January 11, 1991, was an extra-hazardous crossing?

A. I certainly did.

Q. And what is that opinion?

A. It was extra hazardous. It was – I'm not sure there's superlatives – it was extremely hazardous. Unbelievably hazardous.

Transcript of Jury Trial, Vol. VI, p. 64, September 19, 1994 (Testimony of Prof. C. J. Halley, expert witness).

* * *

APPENDIX II

IN THE COURT OF APPEALS, DIVISION 4

STATE OF OKLAHOMA

JAMES M. JOHNSON and FRANCES L. JOHNSON, as Representatives of the Estate of Jeremy Michael Johnson, deceased, Appellees, vs. MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, Appellant.	)	No. 84,527 NOT FOR PUBLICATION (Filed Jul. 16, 1996)

APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA

Honorable James E. Edmondson, Trial Judge

Bill Settle
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MEMORANDUM OPINION

REIF, J.

Missouri Pacific Railroad Company appeals the judgment entered against it in favor of the parents of Jeremy Johnson in this wrongful death lawsuit. Jeremy had been the driver of a pickup truck which was struck by a train at an unprotected crossing in Fort Gibson. After hearing the evidence, the trial court made a special finding that Parents had proven by clear and convincing evidence that Railroad's conduct evidenced a wanton or reckless disregard for the rights of another, oppression, fraud or malice so as to allow the jury to return a verdict for punitive damages in excess of the actual damages awarded. While the jury found Jeremy and Railroad to be equally at fault, it found Railroad to be guilty of wanton, reckless, or intentional conduct and awarded punitive damages in excess of the actual damages.

Railroad's allegations of error on appeal can be categorized into errors concerning the admission of evidence and the conduct of the trial, and errors in the jury instructions. When addressing error in the admission of evidence and the conduct of the trial, the determinative issue is whether the trial judge abused his discretion in making his rulings and whether that abuse materially affected the substantial rights of the complaining party. *Lee v. Volkswagen of American, Inc.*, 688 P.2d 1283, 1290 (Okla. 1984); *see also Middlebrook v. Imler, Tenny & Kugler M.D.'s, Inc.*, 713 P.2d 572 (Okla. 1985).

Without addressing each of the individual items of error alleged by Railroad, we would note that we have scrutinized the record on appeal and with the exception

of the "speed issues," we find this case to have been well and fairly tried by both counsel and the trial court. We find no error in the trial court's rulings on the admissibility of evidence, the conduct of the trial itself, or the submission of the punitive damages claim.

The "speed issues" concern the application of a federal statute found in the Federal Railroad Safety Act, formerly 45 U.S.C. §§ 421-447 (1986), now recodified at 49 U.S.C. §§ 20101-26102 (1994). The pertinent part states:

> § 20106. National uniformity of regulation
>
> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order –
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

Pursuant to this statute, the Secretary of Transportation promulgated regulations setting the *maximum* allowable operating speeds for trains according to the class or type of track upon which they operate. This statute has been

interpreted by the United States Supreme Court in *CSX Transportation v. Easterwood*, 507 U.S. 658 (1993). The court held that "federal regulations adopted by the Secretary of Transportation pre-empt [a plaintiff's] negligence action only insofar as it asserts that [a defendant's] train was traveling at an excessive speed." *Id.* at 676. Our inquiry must then focus on whether the trial court's admission of evidence concerning the train's speed, Fort Gibson's train speed ordinance, and the alleged agreement by Railroad to abide by a lower speed limit was erroneous. Also involved in this inquiry is the trial court's instructions touching upon the speed issues. While it is apparent that Parents assert that the train was traveling at an excessive speed, their claim is not solely one for negligence due to excessive speed. Railroad had a duty to operate the train safely, with due regard for the locale and other conditions. Evidence of the train's actual speed, Railroad's policies concerning speed, Railroad's knowledge of the conditions at the Fort Gibson crossings including previous near misses, and evidence of Railroad's prior involvement and "agreement" with the city of Fort Gibson concerning train speed limits all are admissible to prove elements of negligence other than just negligence due to excessive speed. We find no error in the admission of evidence concerning the "speed issues."

Railroad's predominant allegation of error on appeal is that based upon federal preemption of speed regulation the trial court erred when it instructed the jury that failure of Railroad to comply with the Fort Gibson train speed limit ordinance would be negligence per se. Because we are constrained by stare decisis to follow the

supreme court's interpretation that the federal regulations preempt an action based on excessive speed alone, we must determine whether the giving of this instruction, while perhaps erroneous, was prejudicial to Railroad in such a way that the jury would not have returned the verdict it did but for the erroneous instruction. *Oklahoma Ry. Co. v. Wilson*, 231 P.2d 688 (Okla. 1951). When we consider that the jury found Jeremy to be equally negligent with Railroad for the collision, we cannot say that the negligence per se instruction impacted Railroad in a manifestly prejudical way. This is bolstered by the additional finding by both the trial court and the jury that Railroad was more than just grossly negligent. Both found the conduct of Railroad to be wanton, oppressive, malicious, reckless to the point of disregard for the rights of others, or, perhaps, even intentional as it concerned the operation of the train through Fort Gibson at the time of the collision with Jeremy. We are persuaded that the jury heard the evidence, understood the actions and obligations of the parties, and returned a verdict which reflected their judgment. We do not believe that the negligence per se instruction was so prejudicial in light of the rest of the instructions as to require reversal of the verdict. We also find that the trial court's entry of judgment on the verdict to be proper.

AFFIRMED.

TAYLOR, P.J., and RAPP, C.J., concur.

July 16, 1996